UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MARK HOGLUND, JR., by and through his Guardian Ad Litem, PHILLIP E. JOHNSON, ESQ.,	)	
Plaintiff	)	
v.	)	***Docket No. 99-84-P-H***
DAIMLERCHRYSLER CORPORATION,	)	
Defendant/ Third-Party Plaintiff	)	
v.	)	
TAMMY J. HOGLUND,	)	
Third-Party Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In this diversity action stemming from injuries sustained by a child while an occupant of a Dodge Caravan minivan, defendant DaimlerChrysler Corporation ("DaimlerChrysler") moves pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c) to dismiss Count VII of the plaintiff's amended complaint, setting forth a claim pursuant to the Maine Unfair Trade Practices Act (the "UTPA"). Defendant DaimlerChrysler Corporation's Motion To Dismiss Plaintiff's Claims Under the Maine Unfair Trade Practices Act ("Motion To Dismiss") (Docket No. 31); Defendant DaimlerChrysler Corporation's Memorandum in Support of Its Motion To Dismiss, etc. ("Dismiss Memorandum")

(Docket No. 31); Plaintiff's First Amended Complaint ("Amended Complaint") (Docket No. 16) ¶¶ 82-87. Plaintiff Mark Hoglund, Jr., by and through his Guardian Ad Litem Phillip E. Johnson, Esq., moves for summary judgment as to a portion of DaimlerChrysler's first affirmative defense and the entirety of its second through fifth and seventh affirmative defenses. Motion for Partial Summary Judgment, etc. ("Summary Judgment Motion") (Docket No. 32); Plaintiff's Reply to Opposition to Motion for Partial Summary Judgment ("Summary Judgment Reply") (Docket No. 41) at 1 (withdrawing motion for summary judgment as to sixth affirmative defense); Defendant DaimlerChrysler Corporation's Answer to the Plaintiff's First Amended Complaint and Demand for Jury Trial ("Amended Answer") (Docket No. 18) at 11-13.[1] For the reasons that follow, I recommend that the court deny the Motion To Dismiss and grant in part and deny in part the Summary Judgment Motion.

I. Motion To Dismiss

A. Applicable Legal Standards

The defendant's motion to dismiss invokes both Rule 12(b)(6), premised on failure to state a claim upon which relief can be granted, and Rule 12(c), governing motions for judgment on the pleadings. The standards for both are similar. "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending [the] plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *Roma*

[1]The eighth and final affirmative defense asserted in the Amended Answer concerns the plaintiff's alleged failure to comply with the requirements of the UTPA. *See* Amended Answer at 13.

Constr. Co. v. aRusso, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

Motions for judgment on the pleadings entail "an extremely early assessment of the merits of the case . . . ." *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988). Accordingly:

> [T]he trial court must accept all of the nonmovant's well-pleaded factual averments as true . . . and draw all reasonable inferences in [its] favor. . . . [T]he court may not grant a defendant's Rule 12(c) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief."

Id. (citations omitted). *See also Lovell v. One Bancorp*, 690 F. Supp. 1090, 1096 (D. Me. 1988) (on motion for judgment on pleadings, factual allegations in complaint must be taken as true and legal claims assessed in light most favorable to plaintiff; judgment warranted only if there are no genuine issues of material fact and moving party establishes that it is entitled to judgment as matter of law).[2]

B. Factual Context

For purposes of the Motion To Dismiss I accept the well-pleaded facts of the Amended Complaint, the following of which are material to this recommended decision, as true. Plaintiff Mark Hoglund, Jr., was born on November 8, 1990. Amended Complaint ¶ 1. The plaintiff is the child of Mark and Tammy Hoglund. *Id.* ¶ 3. Mark and Tammy Hoglund purchased a 1985 Dodge

[2]In the case of both Rule 12(b)(6) and Rule 12(c) motions, the movant may submit materials outside of the pleadings and the court may in its discretion consider those materials, converting the motion to one for summary judgment. *See, e.g., Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472, 475 (1st Cir. 2000). DaimlerChrysler in this case submits materials outside the pleadings. *See* Application for Certificate of Title, Certificates of Title and Certificate of Lien attached as Exh. A to Dismiss Memorandum. Inasmuch as those materials are redundant of the allegation in the Amended Complaint that the Dodge Minivan was purchased by both Tammy Hoglund and Mark Hoglund, Sr., Amended Complaint ¶ 23, I decline to consider them or to convert the motion to dismiss to one for summary judgment. *See, e.g., Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 18-19 (1st Cir. 1992) (court may choose to ignore supplementary materials and determine motion under Rule 12).

Caravan (the "Minivan") from its previous owner in South Portland, Maine on or about March 31, 1994. *Id.* ¶ 23. DaimlerChrysler represented that the 1985 Dodge Caravan was especially safe to use as a method of transportation for families and young children. *Id.* ¶ 51. That representation, which was relied upon by the plaintiff's parents, constituted an unfair or deceptive act or practice. *Id.* ¶¶ 52, 85. The Minivan was unreasonably dangerous, unsafe and not designed to prevent injury to children, as a result of which on May 28, 1994 the plaintiff sustained serious and permanent injuries while an occupant of the vehicle. *Id*. ¶¶ 24-29, 85. The plaintiff has incurred and will incur significant medical and rehabilitative expenses and has suffered future lost income and impairment to his earning capacity in an amount expected to be quantified at trial. *Id.* ¶¶ 30-31.

C. Analysis

DaimlerChrysler seeks dismissal of Count VII of the Amended Complaint on the basis that the plaintiff is not a person to whom relief can be granted pursuant to the UTPA. Dismiss Memorandum at 2. The UTPA provides a private remedy to "[a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful" under the UTPA. 5 M.R.S.A. § 213(1). DaimlerChrysler points out that the plaintiff did not buy the Minivan; rather, his parents did. Dismiss Memorandum at 3. Nor in DaimlerChrysler's view did the plaintiff, who was not a purchaser, suffer a loss of either money or property as a result of the transaction. *Id*. at 5.

Inasmuch as appears, the Law Court has not confronted the question whether a child has standing to sue under the UTPA for injuries allegedly caused by goods or services purchased by a parent at least in part for his use or benefit. The Texas Supreme Court, construing similar "purchase

or lease" language in the Texas Deceptive Trade Practices Act (the "DTPA"), has held that standing is established by relationship to the transaction rather than privity of contract. *See, e.g., Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 368 (Tex. 1987). The Texas DTPA affords a right of action to a "consumer," defined as "an individual . . . who seeks or acquires by purchase or lease, any goods or services . . . ." Tex. Bus & Com. Code Ann. §§ 17.45, 17.50. A child for whose use or benefit a parent has purchased goods or services has been held to fit within this definition. *See, e.g., Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420, 1426 (5th Cir. 1992) (estate of child crushed by garage door had standing to sue door-opener manufacturer under Texas DTPA; "one may acquire goods or services that have been purchased by another for the plaintiff's benefit."); *Birchfield*, 747 S.W.2d at 368 (blinded infant "acquired" hospital's goods and services "regardless of the fact that she obviously did not contract for them.").

In construing the DTPA the Texas Supreme Court has been guided by the principle that the DTPA, as a consumer protection statute, should be liberally construed to accomplish its beneficent ends. *See, e.g., Wellborn*, 970 F.2d at 1426. The Law Court likewise has held that civil consumer-protection statutes should be construed liberally to carry out the legislature's beneficent purpose in enacting them. *See, e.g., Tanguay v. Seacoast Tractor Sales, Inc.*, 494 A.2d 1364, 1367 (Me. 1985). The Law Court, if confronted with this constellation of facts, likely would not construe the UTPA in a manner that would tend to leave minors — a class of persons recognized as among those least able to care for themselves — without a remedy.[3]

Inasmuch as the Amended Complaint alleges that the Hoglunds purchased the Minivan at

[3]Moreover, the construction of the UTPA suggested by DaimlerChrysler would lead to absurd results. A child who purchased a candy bar with money given him by a parent would have a cause of action; a child whose parent happened to pay for the candy bar would not.

least in part for the plaintiff's use or benefit, it establishes a sufficient nexus between the plaintiff and the transaction to qualify the plaintiff as the equivalent of a "purchaser" for purposes of the UTPA.

Turning to the second issue, I have little difficulty concluding that the plaintiff sufficiently alleges "any loss of money or property" to sustain an action under the UTPA. The plaintiff contends that he has incurred substantial medical and rehabilitative bills and has suffered a quantifiable loss in expected future earnings. The Law Court has recognized that, for purposes of the UTPA, a loss can consist of money spent to correct the condition allegedly caused by the product or service in question. *See, e.g., William Mushero, Inc. v. Hull*, 667 A.2d 853, 855 (Me. 1995) (amount paid by homeowner to second contractor to lower level of road could be considered damages resulting from first contractor's violation of UTPA, *i.e.*, failure to reduce contract to writing); *see also VanVoorhees v. Dodge*, 679 A.2d 1077, 1082 (Me. 1996) ("to avail themselves of the remedies available pursuant to the UTPA, claimants must demonstrate not only a violation of the UTPA but also that a portion of their damages are attributable to the UTPA violation.").

Inasmuch as the plaintiff is a person with standing to press a cause of action under the UTPA, the Motion To Dismiss should be denied.

II. Summary Judgment Motion

A. Applicable Legal Standards

DaimlerChrysler argues as a threshold matter that the Summary Judgment Motion "is more accurately" a motion to strike affirmative defenses — the grant of which is disfavored — and should be treated as such. Defendant DaimlerChrysler Corporation's Memorandum in Support of Its Opposition to Plaintiff's Motion for Partial Summary Judgment ("Summary Judgment Opposition")

(Docket No. 38) at 4-5. Among cases cited by DaimlerChrysler only one, *Krauss v. Keibler-Thompson Corp.*, 72 F.R.D. 615 (D. Del. 1976), stands for the proposition that an affirmative defense is not a proper subject for summary judgment.[4] *See* Summary Judgment Opposition at 4-5. That holding is in my view premised upon a basic misreading of Fed. R. Civ. P. 56: that because a plaintiff may move for summary judgment only upon "all or any part" of a "claim," and an affirmative defense is not a "claim," summary judgment cannot be had on an affirmative defense. *See Krauss*, 72 F.R.D. at 616. Resolution of an affirmative defense is integral to resolution of a claim; therefore, in moving for summary judgment on an affirmative defense a plaintiff is in fact moving for summary judgment on a part of his claim.[5] *See* 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1381 at 680 (2d ed. 1990) (noting availability of summary judgment pursuant to Rule 56(d) to "enable the court to enter an order indicating that the defense no longer is in controversy."); *see also Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1159, 1189 (1st Cir. 1994) (affirming grant of summary judgment on affirmative defenses); *E.E.O.C. v. Exxon Corp.*, 1 F.Supp.2d 635, 638 (N.D. Tex. 1998), *aff'd*, 202 F.3d 755 (5th Cir. 2000) (noting that motion to strike affirmative defenses had been converted to one for summary judgment). For

[4]Other cases cited by DaimlerChrysler merely sets forth the standard pursuant to which a motion to strike must be decided. *See Habiniak v. Rensselaer City Mun. Corp.*, 919 F. Supp. 97, 99 (N.D.N.Y. 1996); *Nelson v. University of Maine Sys.*, 914 F. Supp. 643, 646-47 (D. Me. 1996); *Coolidge v. Judith Gap Lumber Co.*, 808 F. Supp. 889, 893 (D. Me. 1992); *In re All Maine Asbestos Litig.*, 575 F. Supp. 1375, 1377 (D. Me. 1983); *Sample v. Gotham Football Club, Inc.*, 59 F.R.D. 160, 168-69 (S.D.N.Y. 1973).

[5]In addition, the Federal Rules of Civil Procedure are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. As the *Krauss* court acknowledged (although it felt constrained to hold otherwise), "[o]bviously there are substantial policy reasons for permitting the use of a partial summary judgment motion to dispose of defenses which have no basis in fact." *Krauss*, 72 F.R.D. at 616.

these reasons, I decline to treat the plaintiff's motion for partial summary judgment as a motion to strike affirmative defenses.

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

B. Factual Context

The summary judgment record reveals the following facts material to my recommended

decision.[6] The plaintiff was born on November 8, 1990. Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment ("Plaintiff's SMF") (Docket No. 33) ¶ 1. In March 1994 Mark A. Hoglund, Sr. and Tammy Hoglund purchased the Minivan. *Id.* ¶ 2. On May 28, 1994 Tammy Hoglund placed her son, the plaintiff, in a booster seat and her daughter in an infant safety seat in the Minivan in preparation for a trip to neighborhood yard sales. *Id.* ¶ 3. She left her key in the ignition and did not set the parking brake. Defendant's SMF ¶¶ B(2)-(3); Plaintiff's Reply Statement of Material Facts ("Reply SMF") (Docket No. 42) ¶¶ 2-3. She then left the Minivan, went back upstairs to her family's apartment and returned with her infant boy to find that the Minivan had been engaged into gear and had sunk to the bottom of the Saco River, carrying her two children with it. Plaintiff's SMF ¶ 3. A neighbor heard the commotion, dove into the river and pulled the plaintiff and his sister from the sunken vehicle, saving their lives. *Id.* ¶ 4. The plaintiff suffered catastrophic physical injury as a result of the accident. *Id.* ¶ 5.

John C. Koepele, a senior Chrysler engineer, inspected the Minivan in May and October of 1999. *Id.* ¶ 6. He determined that the shift gate had a normal degree of wear for the mileage driven,

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[6]The plaintiff asserts that DaimlerChrysler does not properly controvert his statement of facts in accordance with Local Rule 56 and that his facts thus should be deemed admitted. Summary Judgment Reply at 5. I agree. Local Rule 56 requires that an opposing statement of material facts "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation . . . ." Loc. R. 56(c). "Facts . . . supported by record citations as required by this rule[] shall be deemed admitted unless properly controverted." Loc. R. 56(e). DaimlerChrysler's opposing facts are not directly responsive to those of the plaintiff; rather, they "admit" DaimlerChrysler's own version of the facts and otherwise deny the plaintiff's facts without specific record citation. *See* Defendant DaimlerChrysler Corporation's Opposing Statement to Plaintiff's Statement of Material Facts, etc. ("Defendant's SMF") (Docket No. 39) ¶¶ A(1)-(22). Accordingly, the plaintiff's statement of material facts is deemed admitted for purposes of this summary-judgment motion. This disposition is not in this case outcome-determinative; however, failure to adhere to the dictates of Local Rule 56 exposes a litigant to that risk.

with no extensive or excessive amount of wear. *Id.* ¶ 7. Koepele also concluded that there had been no alteration of any of the major components of the Minivan "whatsoever" and no misuse by any third party apart from water damage resulting from the accident. *Id.* ¶¶ 13-14. The plaintiff's expert witness, William Rosenbluth, testified that the shift gate on the Minivan was worn between the park and neutral positions at the time of the accident. Defendant's SMF ¶¶ B(9)-(10); Reply SMF ¶¶ 9-10.

At least two patents registered in the mid- to late 1970s proposed shift interlock mechanisms specifically to prevent unattended children from moving a transmission gear selector into drive or reverse. Plaintiff's SMF ¶ 22.

In Koepele's opinion it is foreseeable that (i) people forget to remove their keys from cars, (ii) children would be left unattended in a vehicle, and (iii) children left unattended in a vehicle would fool around inside it and access probably almost any area and place within it. *Id.* ¶¶ 17-20. However, Koepele also testified that it is "unexpected" for an automobile operator to leave the key in the ignition while loading children into a vehicle in circumstances where one or more such children are knowingly being left unattended. Defendant's SMF ¶ B(11); Reply SMF ¶ 11; Deposition of John C. Koepele, attached as Exh. D to Defendant's SMF, at 258-59.

Dennis A. Guenther, Ph.D., a registered mechanical engineer, professor at Ohio State University and expert witness for Chrysler, testified that it is foreseeable that (i) people leave kids in cars unattended and (ii) a child in an automobile might be able to start the car if the keys are left in it. Plaintiff's SMF ¶¶ 18, 21. Christine T. Wood, Ph.D., testified that the sequence of events that occurred on the day of the plaintiff's accident was "somewhat atypical." Defendant's SMF ¶ B(17); Reply SMF ¶ 17; Deposition of Christine T. Wood, Ph.D., attached as Exh. H to Defendant's SMF,

at 129-30.

Although the accident occurred in 1994, the plaintiff did not file suit or otherwise provide DaimlerChrysler with notice of his claim until March 24, 1999. Defendant's SMF ¶ B(8); Reply SMF ¶ 8.

C. Analysis

1. First Affirmative Defense

DaimlerChrysler asserts in its first affirmative defense that "[p]laintiff's late notice of alleged breaches of warranty has prejudiced this defendant, wherefore plaintiff is barred from recovery." Amended Answer at 11. The plaintiff seeks to narrow the application of this defense to Count IV, his only contract claim, in which he alleges breach of warranty. Summary Judgment Motion at 4. DaimlerChrysler responds that it presses the late-notice defense not only as to breach of warranty but also as to claims for punitive damages. Summary Judgment Opposition at 5-7.

The plaintiff predicates his demand for punitive damages primarily on his allegation that the "defendant received information and was on actual notice of the extreme danger which existed" in connection with children's use of Dodge Caravan minivans but failed to provide appropriate safeguards or warnings. Amended Complaint ¶¶ 88-94. DaimlerChrysler wishes to preserve its option to defend against this claim with evidence concerning its receipt (or lack thereof) of notice of incidents or claims, including that of the plaintiff. Summary Judgment Opposition at 6. Such evidence would indeed be relevant to the extent it depicted DaimlerChrysler's state of awareness through the time of the plaintiff's accident. *See, e.g., Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985) (punitive damages available *inter alia* "where deliberate conduct by the defendant . . . is so outrageous that malice toward a person injured as a result of that conduct can be implied.").

However, I fail to see how the defendant's receipt of late notice by the plaintiff of his own claim could have any bearing on such a defense. The plaintiff accordingly is entitled to summary judgment on the first affirmative defense as requested — that is, as to all claims except that asserted in Count IV (breach of warranty).

2. Second Affirmative Defense

DaimlerChrysler asserts in its second affirmative defense that "[t]he plaintiff knowingly and unreasonably assumed any risk complained of." Amended Answer at 12. The plaintiff points out that in addressing a previous motion to strike, the court ruled that the assumption of the risk doctrine was inapplicable as a matter of Maine law to negligence claims but could be "an available legal defense to strict liability claims." Summary Judgment Motion at 4; *see also* Order ("Order") (Docket No. 14) at 3. The plaintiff now seeks a ruling that the doctrine is inapposite in this case to his strict liability claims inasmuch as he is *non sui juris* — that is, incapable as a matter of law of exercising self-care. Summary Judgment Motion at 4-5.

DaimlerChrysler recognizes that under the most recent controlling Maine case, *Welch v. Jordan*, 194 A.2d 841 (Me. 1963), a three-year-old child is considered *non sui juris*. Summary Judgment Opposition at 8.[7] However, it urges the court to reconsider this forty-year-old precedent in view of the alleged heightened sophistication of children today. *Id*. Even assuming *arguendo* that this were a compelling policy argument, the suggested turnabout in Maine law would not be one for this court, in exercising its diversity jurisdiction, to embrace. *See, e.g., Quint v. A.E. Staley Mf'g Co.*, 172 F.3d 1, 17 (1st Cir. 1999) ("Unlike a state court, the federal courts, in diversity cases, are

[7]Moreover, this court in ruling on the plaintiff's earlier motion to strike held (in a different context) that the plaintiff was *non sui juris*. *See* Order at 3.

not free to overrule existing state precedent or chart the future course of state law in such manner as we may see fit.") (citations and internal quotation marks omitted). Inasmuch as the plaintiff in this case is *non sui juris*, and cannot be held responsible for his actions even in the context of a claim of strict liability, *see, e.g., Smith v. Sapienza*, 496 N.Y.S.2d 538, 539-40 (N.Y. App. Div. 1985), the plaintiff is entitled to summary judgment as requested with respect to the second affirmative defense.

3. Third Through Fifth Affirmative Defenses

In its third through fifth affirmative defenses DaimlerChrysler asserts that "[t]he injury and damages alleged were caused by a person or entity for whose conduct this defendant was not responsible and bears no legal responsibility"; that "[e]ven if the subject vehicle was defective, which [DaimlerChrysler] specifically denies, the injuries and damages alleged, if any, were caused by a third party's intentional, knowing and/or negligent misuse of the product"; and that "[a]ny defect which may have existed in the vehicle, the existence of which is denied, did not exist when the vehicle left the control of [DaimlerChrysler]." Amended Answer at 12.

In response to the plaintiff's motion for summary judgment DaimlerChrysler crystallizes these allegations into two defenses, one mechanical and one behavioral:

1. That, to the extent the shift gate is alleged to have been worn, the vehicle was misused by a third party or the condition or defect arose after the vehicle left DaimlerChrysler's control. Summary Judgment Opposition at 10, 12.

2. That Tammy Hoglund's actions — "in particular her disregarding the key-in door chime, her failure to secure the parking brake and her leaving her children unattended in the vehicle with the keys in the ignition" — constituted a misuse of the product and/or a superseding, intervening cause of the accident, proof of which would suffice to relieve DaimlerChrysler of any liability. *Id.*

at 9-12.

Turning first to the mechanical defense, DaimlerChrysler simply adduces no evidence that shift-gate wear (if any) was the result of misuse by a third party or that the condition arose after the vehicle left its control. *See id.* at 10, 12; Defendant's SMF ¶¶ B(9)-(10). There is no triable issue here.[8]

The behavioral defense, whether characterized as misuse or superseding cause, hinges on whether Tammy Hoglund's actions were reasonably foreseeable to DaimlerChrysler. *See, e.g., Ames v. Dipietro-Kay Corp.*, 617 A.2d 559, 561 (Me. 1992) ("In order to break that chain [of causation], the intervening cause must also be a superseding cause, that is, neither anticipated nor reasonably foreseeable.")*; Marois v. Paper Converting Mach. Co.*, 539 A.2d 621, 623 (Me. 1988) (no error in instructions that defendant not liable in strict liability "if (1) it delivered a product in a safe condition, (2) subsequent modifications made it harmful by the time of its use, and (3) if the modifications were not reasonably foreseeable by the manufacturer."); *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909, 913 (S.D. 1987) ("when a misuse occurs it becomes a question of whether there was 'reason to anticipate' or if it was 'foreseeable.'").

The Law Court has indicated that whether an event is expected or unusual has a bearing on whether it is foreseeable. *See Feeney v. Hanover Ins. Co.*, 711 A.2d 1296, 1300-01 (Me. 1998) (lower court did not err in concluding that unexpected, unusual action was not reasonably foreseeable); *Marois*, 539 A.2d at 624 (inasmuch as statute speaks of product reaching user without

[8]Indeed, the only evidence of record concerning misuse or alteration of the mechanics of the vehicle is to the effect that no such misuse or alteration was detected.

"expected" significant change, foreseeability part of strict liability concept).[9]

The plaintiff offers evidence (consisting of the existence of brake interlock patents in the 1970s and testimony from DaimlerChrysler experts Koepele and Guenther) to the effect that the events on the day in question were foreseeable; however, DaimlerChrysler sets forth Koepele's opinion that leaving the key in the ignition while loading children into a vehicle is "unexpected" and Wood's testimony that the sequence of events leading up to the accident was "somewhat atypical."[10] This conflict in the record evidence, coupled with the fact that determinations of foreseeability generally are left to the trier of fact, *see, e.g., Ames,* 617 A.2d at 561, counsels in favor of denial of summary judgment as to the behavioral defense.

4. Seventh Affirmative Defense

Finally, the plaintiff seeks summary judgment with respect to DaimlerChrysler's seventh affirmative defense, in which it contends that "[p]laintiff's claims are barred by the applicable statutes of limitation." Amended Answer at 12; Summary Judgment Motion at 8-9. DaimlerChrysler concedes that on the facts as now developed the claims are not barred by the statute of limitations; however, it attempts to reserve its right to assert a statute-of-limitations defense in the event of discovery or evidence to the contrary. Summary Judgment Opposition at 13. DaimlerChrysler cannot simply reserve such rights. *See, e.g., Simas v. First Citizens' Fed. Credit Union,* 170 F.3d 37, 45-46 n.4 (1st Cir. 1999) (discussing showing necessary under Fed. R. Civ. P.

[9]The word "unexpected" is defined as "[n]ot expected; unforeseen." Webster's II New Riverside University Dictionary 1260 (1994). To "expect" is defined in relevant part as "[t]o look forward to the probable occurrence or appearance of . . . [t]o consider likely or certain . . . ." *Id.* at 454.

[10]The word "atypical" is defined in part as "unusual." Webster's II New Riverside University Dictionary 137 (1994).

56(f) to warrant continuance pending further discovery).

III. Conclusion

For the foregoing reasons, I recommend that the Motion To Dismiss be **DENIED** and that the Summary Judgment Motion be **GRANTED** except with respect to (i) the sixth affirmative defense in its entirety and (ii) the third and fourth affirmative defenses to the extent asserting misuse or superseding-cause defenses based on the actions of Tammy Hoglund, as to which I recommend it be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of April, 2000.

_____

David M. Cohen
United States Magistrate Judge

TRLIST COMPLX
U.S. District Court District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 99-CV-84
JOHNSON v. DAIMLERCHRYSLER CORP, et al
Filed: 03/22/99
Assigned to: JUDGE D. BROCK HORNBY
Jury demand: Both

Demand: $201,000
Nature of Suit: 355
Lead Docket: None
Jurisdiction: Diversity
Dkt# in other court: None
Cause: 28:1332
Diversity-Personal Injury
PHILIP E JOHNSON, ESQ, by and BRUCE C. GERRITY through his Gardian Ad Litum 623-5167
plaintiff [COR]
PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY, LLC
45 MEMORIAL CIRCLE
PO BOX 1058
AUGUSTA, ME 04332-1058
207-623-5300

ROBERT O. NEWTON, ESQ. [COR LD NTC]
PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY, LLC
ONE CITY CENTER
PO BOX 9546
PORTLAND, ME 04112-9546
791-3000

JOEL HALL THOMPSON, ESQ. [COR]
PRETI, FLAHERTY
ONE CITY CENTER
PORTLAND, ME 04112
791-3000

v.

CHRYSLER CORPORATION
PETER M. DURNEY, ESQ. defendant [term 05/12/99] [term 05/12/99] [COR LD NTC]
DAVID W. MCGOUGH, ESQ. [term 05/12/99]

CHRYSLER CORPORATION
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DAVID W. MCGOUGH, ESQ. [term 05/12/99] [COR]
CORNELL & GOLLUB
75 FEDERAL STREET
BOSTON, MA 02110
617-482-8100

CHRYSLER MOTORS CORP, CHRYSLER

PETER M. DURNEY, ESQ. [term 05/12/99] defendant (See above)

CHRYSLER MOTORS CORPORATION [term 05/12/99] defendant (See above) [term 05/12/99] [COR LD NTC]
DAVID W. MCGOUGH, ESQ. [term 05/12/99] (See above) [COR]

DAIMLERCHRYSLER CORPORATION
PETER M. DURNEY, ESQ. defendant (See above) [COR LD NTC]
DAVID W. MCGOUGH, ESQ. (See above) [COR]
STEPHEN J. OTT, ESQ. [COR LD NTC]
MILLER, CANFIELD, PADDOCK & STONE PLC
840 WEST LONG LAKE RD SUITE 200
TROY, MI 48098-6358
248/879-2000

ROBERT J. HADDAD, ESQ. [COR LD NTC]
MILLER, CANFIELD, PADDOCK & STONE, PLC
1400 N. WOODWARD SUITE 100
BLOOMFIELD HILLS, MI 48304-2855
248-645-5000

DAIMLERCHRYSLER MOTORS CORPORATION
PETER M. DURNEY, ESQ. [term 05/12/99] defendant (See above) [term 05/12/99] [COR LD NTC]
DAVID W. MCGOUGH, ESQ. [term 05/12/99] (See above) [COR]